

TESTIMONY ON HOUSE JOINT RESOLUTION P
by Chris A. Shafer
Before the House Judiciary Committee
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I appreciate the opportunity to testify today in support of House Joint Resolution P. I am a Professor at Thomas M. Cooley Law School and teach primarily Constitutional Law, Water Law and Natural Resources Law, but have also taught Federal Administrative Law and Property Law. Prior to joining the faculty 12 years ago, I worked in the DNR and DEQ for almost 20 years and supervised six statutes that regulated construction activities along the Great Lakes shoreline and on lakes, streams and wetlands.

Due process is a bedrock principle of the United States Constitution that is required by the Fifth Amendment for the federal government and the Fourteenth Amendment for the states. Due process of law is also required by Article 1, Section 17 of the 1963 Michigan Constitution. The essential mandate of due process is that when the government intends to deprive an individual of life, liberty or property, there is a constitutional right to a fundamentally fair procedure to determine the legality of such action. In order to ensure the fairness of the process used, three essential components are usually thought to be required for due process: adequate notice; an opportunity to respond; and a neutral tribunal. As the U.S. Supreme Court stated in *In re Murchinson*, 349 U.S. 133, 136 (1955), "a fair trial in a fair tribunal is a basic requirement of due process." More recently, the Court emphasized in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), "of course, an impartial decision maker is essential." In other words, both federal and state governments have the obligation of providing a neutral decision maker, meaning one who is not inherently biased against any of the parties involved in the case.

In my judgment, House Joint Resolution P is fully consistent with the mandates of due process and the requirement of fairness in the judicial process. House Joint Resolution P proposes amending Article VI of the Michigan Constitution to specify the conditions and circumstances under which the impartiality of a justice of the Supreme Court may reasonably be questioned and, consequently, when the justice should recuse himself or herself from the proceedings. The new Section 31 provides excellent standards and guidance to the justices for identifying potential or actual conflicts of interest, or the appearance of bias that would justify, if not require, the individual justice's recusal. The standards and guidance specified in the new Section 31 are very reasonable and comport with the due process requirements of maintaining "a fair trial in a fair tribunal."

The timing of this proposal is especially propitious in view of the U.S. Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, No. 08-22 (decided June 8, 2009). In *Caperton*, the Court ruled that a West Virginia Supreme Court justice who received a \$3 million campaign contribution from a mining company that subsequently had an appeal of a \$50 million judgment pending before the state Supreme Court, must

disqualify himself from the proceedings. The Court emphasized that “there are objective standards that require recusal when ‘the probability of actual bias on behalf of the judge or decision maker is too high to be constitutionally tolerable.’” *Caperton*, Slip Op. at 1, (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Court stated that the proper inquiry was whether the interest involved “‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Caperton*, Slip Op. at 7 (quoting *Withrow*, 421 U.S. at 47). The Court emphasized that the West Virginia judicial situation was an extreme example where the Constitution required recusal, but because judicial integrity is such an important state interest, states are free to adopt more rigorous standards for recusal than required for due process. In view of the Court’s decision in *Caperton*, the Committee may wish to amend Joint Resolution P to add another circumstance that would require recusal, namely where the justice or judicial candidate has accepted a substantial campaign contribution from a person, corporation or organization that is a party to the proceedings.

In conclusion, I believe that House Joint Resolution P is a very appropriate and measured proposal that is fully consistent with the constitutional mandates of due process, and that Representatives Meadows and Lipton are to be commended for their efforts in this regard. I would be happy to respond to any questions that the Committee members may have for me.